

Completed acquisition by Sonoco Products Company of Weidenhammer Packaging Group GmbH

ME/6485-14

The CMA's decision on reference under section 22(1) of the Enterprise Act 2002 given on 27 January 2015. Full text of the decision published on 25 February 2015.

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Introduction

1. On 31 October 2014, Sonoco Products Company (**Sonoco**) acquired Weidenhammer Packaging Group (**Weidenhammer**) (the **Merger**).
2. On 13 January 2015, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that the Merger constitutes a relevant merger situation that has resulted, or may be expected to result, in a realistic prospect of a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).
3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to Sonoco of the SLC Decision. However, in order to allow Sonoco the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 22 on the date of the SLC Decision.
4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period, ie by 20 January 2015, or Sonoco indicated before this deadline that it did not wish to offer such undertakings, then the CMA would refer the Merger for a phase 2 investigation pursuant to sections 22 and 34ZA(2) of the Act.

5. Pursuant to section 34ZA(2) of the Act the CMA is not prevented from making a reference under section 22 of the Act because it is considering whether to accept undertakings under section 73 of the Act but no such undertakings are offered or accepted.
6. On 20 January 2015, Sonoco offered the CMA: (i) a behavioural remedy; and (ii) a structural remedy (together the **Proposed Undertakings**). Sonoco has indicated that its preferred undertaking was the behavioural remedy.
 - The behavioural remedy consists of the following elements (these elements taken together constitute the **Proposed Pricing Remedy**):
 - All current contracts will be honoured on their current terms.
 - In relation to new contracts or purchase orders, Sonoco [offered a behavioural remedy] based on agreed price indices (which can result in an increase or decrease) [and consumer price index or price freeze and retail price index]. This undertaking would last for a period of [✂].
 - [✂].
 - [✂].
 - The structural remedy consists of Sonoco divesting [✂] to an up-front buyer, [✂], with all associated assets and, in the view of Sonoco, resources sufficient to allow the [✂] to be a standalone business (**Proposed Divestment remedy**) (see further details below in paragraphs 21 to 26).

Assessment of the Proposed Undertakings

7. In the SLC Decision, the CMA decided that it is or may be the case that the Merger has resulted or may be expected to result in an SLC in the market for the production and supply of composite cans for food products in the UK.
8. The SLC Decision states that if, pursuant to section 73A(2) of the Act, the CMA decides there are no reasonable grounds for believing that it might accept any undertaking offered by the Parties, or a modified version of it, then the CMA will refer the Merger pursuant to sections 22 and 34ZA(2) of the Act.
9. The CMA has an obligation under section 73(3) of the Act to have regard, when accepting undertakings in lieu of reference, to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it. Accordingly, the remedies proposed must be

clear-cut and capable of ready implementation.¹ This means, amongst other things, that the CMA must be confident that all the potential competition concerns that have been identified in its investigation would be resolved by means of the undertakings in lieu without the need for further investigation.

Proposed Pricing Remedy

10. As noted in the Exceptions Guidance, the CMA is generally unlikely to consider, at the first phase, that behavioural undertakings will be sufficiently clear-cut to address the identified competition concerns. This is because behavioural remedies bring a number of risks which can reduce their effectiveness or create competition concerns elsewhere. Behavioural remedies may also give rise to concerns relating to monitoring and enforceability.² Nevertheless the CMA does not inevitably refuse behavioural remedy offers. In particular, it will consider behavioural undertakings where it considers that divestment would be clearly impractical or is otherwise unavailable.
11. Against the background of this general policy, the CMA has considered the Proposed Pricing Remedy's ability to offer a sufficiently clear-cut solution to the concerns it has identified.
12. The CMA notes that, although Sonoco's prices would be controlled, the pricing remedy would not address the risk of Sonoco reducing the quality of its products and service as a result of the elimination of Weidenhammer's competitive constraint. The Merger may also reduce Sonoco's incentives to innovate. In these respects, the Proposed Pricing Remedy does not fully address the competition concerns identified in the SLC Decision.
13. The CMA also notes that any effective remedy would need to apply as long as an SLC persists to provide a clear-cut solution. It considers that this period is difficult to predict in this case as it is uncertain to what extent market conditions may evolve in the next five years. It is therefore not sufficiently clear that any remedy would no longer be required after this relatively short period.
14. The CMA considers that the Proposed Pricing Remedy is not (i) sufficiently clear-cut, and (ii) not capable of fully addressing the competition concerns identified in the SLC Decision.

¹ *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, December 2010 (*Exceptions Guidance*), adopted by the CMA as set out in *Mergers: Guidance on the CMA's jurisdiction and procedure*, Annex D), at paragraphs 5.6-7.

² See the *Exceptions guidance* regarding the risks raised by behavioural remedies, paragraphs 5.39-41.

Proposed Divestment Remedy

15. The CMA considers that the ‘restoration of the pre-merger situation in the markets subject to an SLC will generally represent a straightforward remedy’ and, therefore, the divestiture of all or part of the acquired business is normally the ‘starting point’ when considering a divestiture package.³
16. The CMA would therefore ordinarily expect a divestment remedy offer to include the divestment of Weidenhammer’s business in the UK, which consists of all its Bradford facility and associated assets.
17. [REDACTED].
18. [REDACTED].
19. [REDACTED].
20. However, the CMA has assessed below whether the Proposed Divestment Remedy ([REDACTED]) would operate as a clear-cut remedy and whether it would be capable of ready implementation.
21. First, [REDACTED] Sonoco [REDACTED] was not prepared to sell the freehold [REDACTED] unless an appropriate price was offered for it. Otherwise, Sonoco was only prepared to enter into an agreement to lease [REDACTED] for five years with an option to extend for a further five years, and thereafter an option to purchase the freehold at fair market value.
22. The CMA considers that, [REDACTED], Sonoco’s Proposed Divestment Remedy raises doubts as to whether the potential purchaser would have the ability and incentive to effectively compete with Sonoco in the long term. [REDACTED]. Furthermore, the potential purchaser may only be incentivised to operate the [REDACTED] for the duration of the [REDACTED], without seeking to expand its business by competing with Sonoco.
23. [REDACTED].
24. [REDACTED].
25. For the reasons set out in paragraphs 21 to 24, the CMA cannot be confident that the Proposed Divestment Remedy ([REDACTED]) would provide the same level of competitive constraint on Sonoco [REDACTED] imposed pre-Merger.

³ See paragraph 3.6 of the Merger remedies: Competition Commission guidelines (CC8 November 2008), adopted by the CMA as set out in *Mergers: Guidance on the CMA’s jurisdiction and procedure*, Annex D).

26. Thirdly, there are implementation and transitional risks associated with the Proposed Divestment Remedy, in particular, because:
- the divestment business is not a standalone existing business;
 - there are significant transitional arrangements required (see below); and
 - there are no other UK based large producers of composite cans for food products with knowledge of the market place and pre-existing technical expertise.
27. To mitigate these risks, Sonoco is offering an up-front buyer solution which requires a sale agreement to be signed prior to the acceptance of undertakings. An up-front buyer solution is usually only conditional on: (i) formal CMA approval of the proposed purchaser; and (ii) final acceptance by the CMA of the divestment undertaking. However, under the Proposed Divestment Remedy, completion would be conditional on Sonoco [redacted] which may take up to 200 days. This delay on completion significantly increases the risks of deterioration of the divestment business and it also creates the risk that the buyer may withdraw after the CMA has finally accepted undertakings in lieu of reference (following any acceptance of undertakings in lieu of reference the CMA no longer has the statutory power to make a phase 2 reference).
28. This buyer withdrawal risk after acceptance of undertakings could be mitigated, to some extent, if Sonoco offered to agree to the appointment of a divestment trustee with a mandate to sell the divestment business [redacted] in the event that Sonoco is unable to sell the divestment business. Sonoco did not make this offer.
29. For the reasons set out above, the CMA therefore considers that the Proposed Divestment Remedy offered by Sonoco is not a clear-cut solution to the competition concerns identified as arising from the Merger and capable of ready implementation.

Decision

30. For the reasons set out above, after examination of the Proposed Undertakings, the CMA does not believe that they would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
31. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.

32. Therefore, pursuant to sections 22 and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

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Competition and Markets Authority
27 January 2015